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NO. 88-371

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF VERMONT,
PETITIONER

V.

RICK A. PRESTON,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a criminal prosecution is brought solely for the purpose of subjecting the accused to custodial interrogation on a second, uncharged, offense, does the accused's assertion of his right to counsel on the charged offense invoke his right to counsel in connection with custodial interrogation on the uncharged offense?

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STATEMENT OF THE CASE

Respondent was sought by Vermont authorities for questioning about a homicide. The authorities planned to use the occasion of respondent's scheduled arraignment on another charge to question him about the homicide. When respondent failed to appear for arraignment on that charge, "[t]he team of [investigators] decided to obtain an arrest warrant on the simple assault charge and to use this pretext as a means of finding [respondent] and questioning him regarding the homicide." Pet., App. 2a. Respondent was arrested in Florida as a fugitive on the simple assault charge and placed in custody. At arraignment on that charge, "he requested counsel." id., 3a, and the Vermont authorities who came to Florida to question respondent about the homicide were "informed that [respondent] had been assigned counsel on the fugitive from justice charge and that he was being held in custody pending further proceedings on that charge. However, the team members made no effort to contact the appointed counsel before questioning him," id. Respondent remained in custody continuously from his arrest in Florida until his custodial interrogation by Vermont authorities two and one-half days after his Florida arraignment. Id. The Vermont Supreme Court found that respondent, during his custody in Florida, "requested...a meeting [with his appointed Florida] attorney once in writing and at least once orally." Id.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION APPEALED FROM IS NOT FINAL

The state seeks review of the decision of the Vermont Supreme Court filed July 1, 1988. This is not the final decision in this appeal. As noted in its petition (at 1, n.1), the state filed a timely motion for reargument of the July 1 decision on July 8, 1988. See Vermont Rule of Appellate Procedure 40. This motion was denied by order filed September 2, 1988, after the petition was filed in this Court. On September 9, 1988, the state again filed a timely motion for reargument of the Vermont Supreme Court's

September 2 order; this motion is still pending.

Rule 20.4 of the rules of this Court provides that if a petition for rehearing is timely filed by any party, the time for filing a petition for a writ of certiorari runs from the date of denial of rehearing or entry of a subsequent judgment entered on the rehearing. The state's petition thus seeks review of a nonfinal judgment. Chicago G.W.R. Co. v. Basham, 249 U.S. 164, 167 (1919).

Since the decision appealed from is not the Vermont Supreme Court's latest, or its last, judgment in this matter, the writ should be denied.

II. PETITIONER SEEKS REVIEW OF A QUESTION NOT PRESENTED BY THE UNIQUE FACTS OF THIS CASE; THAT QUESTION IS NOT OF NATIONAL IMPORTANCE

The question presented by petitioner, Pet. i, is not the question presented by the case. The issue is not whether invocation of the right to counsel in one proceeding forecloses later interrogation "in an unrelated... investigation", Pet. i. We can assume (for purposes of this argument only) that that question can be answered in the negative (but see Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988)), and that in the normal case an accused's request for counsel at arraignment does not protect him against custodial interrogation on a completely different offense. Cf. Hoffa v. United States, 385 U.S. 293, 308 (1966), upholding the admission of post-indictment statements "relat[ing] to the commission of a quite separate offense." Room must nevertheless be made for the exceptional case, in which formal criminal proceedings have been initiated solely as a pretext to make the accused available for custodial interrogation in connection with a second, uncharged offense. In such a situation it would be pure formalism to hold that a request for counsel made in connection with the charged offense does not invoke the right to counsel in connection with the very custodial inter-

rogation for which that charge was brought.[1]

This is that deviant case. The defendant was cited for simple assault and failed to appear. Following his failure to appear the investigators, suspecting him of involvement in a homicide, "decided to obtain an arrest warrant on the simple assault charge and use this pretext as a means of finding defendant and questioning him regarding the homicide." Pet. 2a. The formal commencement of the simple assault prosecution, the arrest warrant, and the NCIC request for defendant's arrest, were all undertaken solely as a means to this end. See also the Trial Court's Findings of Fact, attached hereto as an appendix, Par. 5-25.

It is true that the question which this case properly presents has not been passed on by this Court. But the issue arises so infrequently, and has been of so little concern to the lower courts, that it cannot be characterized as one of national importance, nor, given the dearth of reported decisions, is it a question about which the courts of appeals are in disagreement.

Former Chief Justice Burger, writing in dissent in Maine v. Moulton, 474 U.S. 159, 185 (1985), noted that courts were in agreement that Massiah v. United States, 377 U.S. 201 (1964) "does not prohibit the introduction of incriminating statements obtained in good faith by the Government even after an indictment at a trial involving an offense different from that covered by the indictment," (emphasis added).

The implied exception is a narrow one. Two prosecutions may be related and yet be "different" offenses for purposes of Massiah. See United States v. Lisenby, 716 F.2d 1355, 1359 (11th Cir. 1983); United States v. Grego, 724 F.2d 701, 702-3 (8th Cir. 1984). In United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987), cert. denied, 107 S.Ct. 3240 (1987), the court held that two offenses related only by the fact that the same weapon was involved in both were clearly different offenses for Massiah purposes,

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[1]The sixth amendment right to counsel may attach even though no formal accusatory pleading has been filed. Escobedo v. Illinois, 378 U.S. 478, 485 (1964); DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir. 1986).

noting that there had been no claim that the offenses "were part of any pattern or plan." Id., at 121, n. 1. See also United States v. Chu, 779 F.2d 356, 367-68 (7th Cir. 1985). The same result was reached in Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988). In Butler, as here, the accused was arrested on an assault charge, asserted his right to counsel (by retaining counsel), and was subsequently questioned in an unrelated murder investigation. The Fourth Circuit held the confession admissible, noting that there had been no suggestion "that Butler's arrest on the assault charges was a sham intended to make him available for questioning upon a more serious offense." Id., at 258. Beyond these dicta, little has been written on the subject.

The issue is interesting but not nationally important. Cf. Lisenby at 1361 (Godbold, J., dissenting) ("Differing views of judges about what is the same offense and what are separate offenses under the facts of a particular case is hardly, by itself, a subject for en banc consideration.") Given the paucity of reported cases no split in opinion (indeed, very little opinion at all) can be shown.

III. THE VERMONT SUPREME COURT'S DECISION DOES NOT EXTEND EDWARDS V. ARIZONA; THE DECISION IS A CORRECT APPLICATION OF THIS COURT'S RECENT DECISIONS CONSTRUING EDWARDS

The Vermont Supreme Court's decision in this case follows logically from this Court's holdings in Michigan v. Jackson, 475 U.S. 625 (1986) and Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

At the outset, respondent notes that petitioner misstates its "Question Presented": this case does not present the question whether mere assignment of counsel "automatically invokes a defendant's Fifth Amendment right to counsel." Respondent did more than "accept counsel at an arraignment," Pet. 4; he requested counsel at arraignment, as the state elsewhere concedes (Pet. 2) and the Vermont Supreme Court found.

Michigan v. Jackson establishes that a request for counsel at arraignment protects a defendant's fifth amendment privilege

against self-incrimination by barring subsequent custodial interrogation initiated by state authorities. While Edwards v. Arizona, 451 U.S. 477 (1981), involved a request for counsel during custodial interrogation, Jackson forecloses the argument that a request for counsel at arraignment does not protect a defendant during later custodial interrogation. Petitioner is thus incorrect in asserting that "[t]he Court has never extended Edwards to situations where counsel was never requested or sought during custodial interrogation," Pet.5 (emphasis in original).

Jackson accepted the state court's conclusion that the source of those defendants' protection was the sixth amendment right to counsel, since, as in this case, the sixth amendment right to counsel had attached.[2] But nothing in Jackson suggests that an entitlement to counsel under the sixth amendment, and a request therefor, gives a defendant less protection for his privilege against self-incrimination than a request for counsel arising solely from fifth amendment entitlements. On the contrary,

> In our opinion..., the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before. Id., at 631.

Petitioner also asks this Court to assume that respondent made a limited request for counsel that did not cover custodial interrogation. The Court's clear rule is just the opposite: unless the defendant himself clearly and unequivocally limits his request for counsel--not the case here--the request will be given an expansive construction. Connecticut v. Barrett, ___U.S.___, 107 S.Ct. 828, 93 L.Ed.2d 420 (1987).

Finally, the state's attempt to escape the requirements of Edwards by reliance on an "unrelated crime" theory is foreclosed by Arizona v. Roberson, ___U.S.___, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Even if the homicide case is viewed as unrelated to the fugitive/simple assault case, respondent's assertion of his right

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[2]The Court did not hold, however, as had the Michigan state court, that Jackson did not also have or assert fifth amendment right to counsel protections at arraignment. See 475 U.S. at 630, n. 4.

to counsel on the latter is effective as to the former since respondent remained in continuous custody after he asked for counsel on the Florida arrest until after his interrogation about the homicide. While the Vermont Supreme Court did not expressly rely on Roberson, it relied on a holding which this Court approved in Roberson. See United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir 1987), cert. denied, 107 S.Ct. 3240 (1987), cited in Roberson, 100 L.Ed.2d at 712 n. 3.

The Vermont Supreme Court's decision is a correct application of settled law to the facts and presents no question of general importance. The conflict in decisions of lower courts is illusory; all the state and Federal circuit decisions cited in favor of petitioner's position predate Roberson. At least one of these courts has changed its views in light of Jackson and now follows Espinoza. Cervi v. Kemp, ___F.2d ___, 1988 Westlaw 90120 (11th Cir. August 26, 1988), pages 18-19, n.11. The court below fully considered and correctly decided the issues in light of this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 28th, 1988

CERTIFICATE OF SERVICE

I certify that I served the foregoing Respondent's Brief in Opposition by mail on Susan R. Harritt, Esq., Counsel of Record for Petitioner, Office of the Attorney General, State of Vermont, 109 State Street, Montpelier, VT 05602, on the 28th day of September, 1988. All parties required to be served have been served.

Henry Hinton

APPENDIX

STATE OF VERMONT

WASHINGTON COUNTY, ss

State of Vermont	District Court of Vermont
v.	Unit #2, Washington Circuit
Rick Preston	Docket No. 332-3-86WnCr

Findings of Fact, Conclusions of Law and Order

Defendant is charged with first degree murder pursuant to common law and 13 V.S.A. §§ 2301 and 2303. Defendant has moved to suppress and exclude from evidence at trial all written and oral statements he made to the police during the period of March 15, 1986 through March 18, 1986. Hearings were held before the undersigned on defendant's motion on July 25th and August 14, 1986. Defendant was present with his then attorney, Richard I. Rubin, Esq. He is now represented by Stephen S. Blodgett, Esq. Appearing for the State were Terry Trono, Washington County State's Attorney and David Tartter, Assistant Attorney General.

At the hearings, the State presented testimony of Sheriff Ronald West, Lawrence Dodge, and Detective Brent Curtis. Defendant testified and offered the testimony of

Carolyn Hutchinson and Constance Keresy.

The parties submitted proposed findings of fact and memoranda of law. Based on the arguments of counsel, credible evidence of record and applicable law, the court makes the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. Frank Evans was found murdered in his apartment on South Main Street in Barre, Vermont on January 20, 1986.

2. An investigation was immediately begun to attempt to locate the perpetrator and an investigative group was formed consisting of Terry Trono, Washington County State's Attorney, Detective Brent Curtis, Barre City Police Department, Ronald West, Washington County Sheriff, and Lawrence Dodge, Investigator with the Washington County State's Attorney's office. This group met frequently and the investigation was coordinated by its members.

3. The investigation very shortly focused on the defendant, Rick Preston. Defendant had resided with the deceased and was missing. He became a principal suspect.

4. It became a major objective of the investigating team to question defendant. Information was released to

the press indicating that defendant was not a suspect, in order that he not be deterred from talking to the investigating officers. The primary motive was to discourage flight.

5. On or about December 31, 1985 defendant was cited to appear on a misdemeanor charge of simple assault. The citation was issued by Montpelier Police Officer Kent Goslant and arose out of an alleged altercation on New Year's Eve between defendant and Carmel Edson during which defendant was alleged to have slapped Carmel Edson. This charge was not solicited by the State's Attorney or any other police agency in connection with the investigation of the Evans murder. The offense occurred in Montpelier.

6. The citation required defendant to appear in the Vermont District Court in Barre on February 3, 1986.

7. The team decided not to file the simple assault information and affidavit, out of concern that should defendant fail to appear and an arrest warrant issue an uninformed arresting agency could compromise the investigation.

8. An additional concern that prompted the decision not to file the simple assault information was that defendant's potential appearance at the arraignment and request for a public defender would impede the investigation.

9. The team wished to question defendant uncounseled in a non-custodial setting if possible.

10. Detective Curtis was sent to the courthouse to meet him but defendant did not appear for his arraignment on February 3, 1986.

11. During the next few days, as they had been unable to establish contact with the defendant, State's Attorney Trono, Detective Curtis, Sheriff West, and Lawrence Dodge discussed the advisability of obtaining a warrant on the simple assault charge.

12. No probable cause existed to seek a warrant for defendant's arrest on the homicide.

13. By February 7, 1986, the investigating officers and State's Attorney Trono concluded that defendant had probably left the state and that the most effective way to find and hold him for questioning on the murder was to obtain a warrant for his arrest on the simple assault charge.

14. On February 7, 1986 the information charging simple assault was filed and Lawrence Dodge filed a supplemental affidavit in support of the application for a warrant. Probable cause was found and a warrant was issued on February 7, 1986 for failure to appear on February 3, 1986.

15. It was the intention of the officers investigating the homicide to use the warrant which could

be issued on the simple assault charge to locate, hold, and question Rick Preston concerning the murder of Frank Evans.

16. The officers investigating the homicide had no concern with the prosecution of the misdemeanor assault charge. The State's Attorney, however, would have prosecuted this charge and requested a warrant in the normal course of business.

17. Defendant would not have been extradited on the simple assault charge from beyond the boundaries of Vermont were it not for the desire of the team investigating the homicide to question him concerning his involvement in the death of Frank Evans.

18. Lawrence Dodge arranged to have a temporary wanted persons bulletin placed in the National Crime Information Center (NCIC) on February 7, 1986.

19. Lawrence Dodge entered a "temporary felony want" (Defendant's Exhibit #D). The NCIC Operating Manual describes the criteria for entry in a wanted person file. It states in pertinent part:

> 6. A temporary felony want record, message key (MKE) code ET, may be entered to establish a "want" entry when a law enforcement agency needs to take prompt action to apprehend a person who has committed, or the officer has reasonable ground to believe has committed a felony.

(emphasis in original; Defendant's Exhibit #F at 7-1, 7-2).

20. The NCIC entry form that was used is the standard form which must be completed prior to any permanent entry for wanted persons being made in the NCIC.

21. The entry form advised, among other details, that defendant was charged with simple assault, was considered dangerous, and armed with a knife.

22. The finding and holding state was instructed to contact Detective Brent Curtis, who was the chief investigating officer on the homicide investigation. The Montpelier Police Department that originated the simple assault charge was not to be the point of contact.

23. The request to hold was entered for the entire United States.

24. In 1985, 314 arrest warrants, in all categories, issued in Washington County. Only five were entered in the NCIC.

25. On March 13, 1986, defendant was arrested by Officer Monroe of the Ormond Beach, Florida Police Department.

26. Defendant was nineteen years old at the time of his arrest. He had completed the eighth grade at Lamoille Union High School. He had never been incarcerated before his arrest on March 13, 1986.

27. Defendant had entered the Ormond Beach Police Station voluntarily, seeking shelter and to report being robbed. After becoming suspicious, Officer Monroe ran a NCIC check on him. As a result of a "hit", defendant was arrested on a fugitive from justice charge arising out of the warrant for his arrest obtained in connection with the Vermont charge of simple assault.

28. Defendant was arraigned on the fugitive from justice charge on March 13, 1986, in the Volusia County, Florida Court. He was found to be indigent, and after requesting counsel, was appointed the services of the Volusia County Public Defender.

29. Defendant attempted to contact a former employer while he was in jail but the individual refused to accept his collect call.

30. Defendant believed his mother lived near his place of incarceration; he did not know how to reach her.

31. Defendant testified without corroboration that he requested counsel five to ten times while he was in jail. Based on credible evidence, the court finds that he made one written and one oral request for counsel. At no time did he meet with an attorney.

32. At 11:00 A.M., Saturday, March 15, 1986 when he met with Sheriff West and Officer Curtis, defendant had been incarcerated without access to counsel for two and one half days.

33. Defendant testified that he made no friends while in jail and that he was uncomfortable and afraid of his Black cell-mates.

34. On or about March 13, 1986, when word was received that defendant had been arrested, the team decided to travel to Florida.

35. Prior to their arrival in Florida no member of the team informed the authorities at the correctional center that they planned to meet with defendant there.

36. The State's Attorney and other team members converged on Volusia County, Florida at different times, State's Attorney Trono, Lawrence Dodge, and Officer Scott Vanderbush of the Barre City Police Department, and Sargeant Ronald DiVincenzi traveled from Vermont. The others were on vacation at the time. Detective Curtis traveled from the Caribbean and Sheriff West from South Carolina.

37. On arrival and before attempting any interview with defendant, State's Attorney Trono and the officers spoke with local police, prosecutors and corrections personnel. As a result of these conversations, the investigating officers became aware, prior to the interrogation of the defendant, that he had been arrested on the Vermont warrant, that he had appeared before a local judge on March 13, 1986, that he had requested and been assigned counsel on the fugitive from justice charge,

and that he was being detained pending further proceedings at the Volusia County Correctional Facility.

38. On Saturday, March 15, 1986, Sheriff West and Detective Curtis went to the Volusia County Correctional Facility where defendant was in custody, with the intent to interrogate him about the Evans homocide.

39. No prior contact with defendant's local counsel was attempted. The officers believed that the law did not require it.

40. Sheriff West and Detective Curtis were permitted to see defendant at approximately 11:00 A.M. on Saturday, March 15, 1986. They identified themselves and met with him in an "attorney's room", approximately eight by twelve feet in size. The room had three chairs, a table, metal shelves, and window in the door. The door was closed.

41. Defendant had no contact with friends, family, or counsel prior to his meeting Sheriff West and Detective Curtis.

42. Sheriff West and Detective Curtis intentionally spoke with defendant for approximately forty minutes prior to advising him of his Miranda rights. The conversation was relaxed and friendly. The officers did not say why they were speaking with defendant but their purposes were to make him comfortable and relaxed, not scare him off, determine his intellectual capacity and emotional condition and facilitate both a waiver of his Miranda

rights and a successful interrogation. /1

43. Defendant and the officers discussed defendant's relatives who Sheriff West knew in Lamoille County, the officers' recent vacations, defendant's recent experiences in Boston, his trip to Florida, and the fact that he had been robbed.

44. Prior to being advised of his Miranda rights, defendant was not told that he was about to be interrogated about the death of Frank Evans.

45. At no time during the interrogation was the simple assault charge mentioned.

46. At 11:40 A.M. Sheriff West read the following rights to defendant:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to a lawyer before any questioning and to have him present with you during any questioning.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before any questioning, if you wish. That is called a Public Defender.
5. If you decide to answer questions, you may stop the questioning at any time.

/1 Miranda v. Arizona, 384 U.S. 436, 444 (1966).

(State's Exhibit #1). After each right was read to him, defendant was asked if he understood that right, and each time he replied "yes." After the rights were read to him, he was asked if, having the rights in mind, he wanted to talk with the officers. He answered "yes."

47. Sheriff West read the section of the Miranda rights form entitled "waiver." The form indicated that he had been advised of his rights and understood them, that no threats or promises had been made to him, and that, knowing his rights, he agreed to waive them and to talk to the officers. No discussion was held or explanations given concerning this part of the form. Defendant signed the waiver. The officers did not tell him before he signed the waiver that the interrogation would concern the death of Frank Evans.

48. Approximately thirty minutes into the post-Miranda interrogation, defendant was asked if he knew Frank Evans was dead, to which he replied "no."

49. The officers told defendant that Evans had been murdered and that they knew defendant killed him. Defendant initially denied any guilt.

50. Approximately ninety minutes after being read his Miranda rights, defendant admitted that he had killed Frank Evans.

51. No part of the conversation before defendant confessed was tape recorded.

52. After defendant admitted killing Evans, the officers asked if they could tape the confession. Defendant agreed.

53. During a lunch break on March 15, the officers consulted with State's Attorney Trono who suggested what questions to ask defendant.

54. On March 16, 1986, after defendant was moved to the Volusia County jail, Sheriff West and Detective Curtis again questioned him to supplement the previous day's statements and to obtain a written confession.

55. Defendant had no contact with friends, family, or counsel between the March 15 and March 16 interviews. He was still in custody.

56. The officers again read the Miranda rights to defendant before they questioned him.

57. Defendant agreed to talk with the officers and to provide them with a written statement.

58. Detective Curtis asked defendant to write that no threats or promises had been made to get him to confess. Defendant wrote that no "threats of violence" had been used against him.

59. On March 17, 1986, defendant appeared in the Volusia County Circuit Court, was advised of his rights and waived extradition on the charge of assault.

60. On March 17, 1986, while being transported back

to Vermont from Florida, defendant told Sheriff West that he was sorry that he had lied to the officers at the beginning of the interrogation. The comment was not made in response to any question or remark by either of the officers. Defendant volunteered it.

61. Around midnight on March 17, 1986, defendant arrived in Vermont escorted by Sheriff West and Detective Curtis. The officers took defendant to the Barre City lock-up.

62. In the morning of March 18, 1986, Detective Curtis and Sheriff West met with State's Attorney Trono at his office.

63. The simple assault charge was on file with the Vermont District Court in Barre and no additional paperwork was required prior to arraignment on that charge.

64. The State's Attorney and the officers decided to obtain a "Vermont confession" prior to defendant's arraignment on a homicide charge being prepared.

65. A thirty page transcript of the March 15, 1986 confession had been prepared the previous day. It was decided to have defendant read this transcript and to have him ratify it and adopt his Florida confession while still at the Barre City Police Department. State's Attorney Trono, Sheriff West and Detective Curtis also decided to attempt to obtain a second written confession prior to

arraignment.

66. From 10:00 A.M. to 12:00 noon Detective Curtis and Sheriff West were at the State's Attorney's office preparing Detective Curtis' affidavit in support of probable cause on the homicide charge. The affidavit is one typed page.

67. Carolyn Hutchinson, the acting Clerk of the Vermont District Court in Barre on March 18, 1986, notified the offices of State's Attorney and County Sheriff that the defendant's arraignment was scheduled for 1:00 P.M. on all pending charges.

68. Detective Curtis and Sheriff West were aware that the clerk had requested that defendant be at the court between 12:30 and 12:45 to meet with a public defender.

69. Detective Curtis and Sheriff West went to the Barre City Police Department and met with defendant in the Sergeant's room. At 12:35 P.M. they advised him of his Miranda rights again; defendant signed a waiver form at 12:40 P.M. Defendant never indicated that he did not understand his rights, that he wished to assert any of them, that he did not wish to talk, or that he wanted to talk with a lawyer.

70. The plan was to obtain the "Vermont Confession" before taking the defendant to court for arraignment.

71. When the scheduled arraignment time came and

went, Ms. Hutchinson called the Police Department to determine the cause of delay and advised that the judge was waiting. She was told that the paperwork was not yet complete. Ms. Hutchinson suggested to State's Attorney Trono that the defendant be taken to court on the simple assault charge if the homicide paperwork was not yet complete.

72. Throughout the interrogation on March 18, defendant appeared alert and responsive. He did not appear to be under the influence of alcohol or drugs. He never indicated that he did not want to answer questions, or that he wanted to talk to a lawyer or to anyone else. He never indicated any unwillingness to review his earlier statement or to write out another statement. No promises or inducements were made to him. He was told that the judge was waiting.

73. Defendant took approximately an hour and a half to read over his earlier statement and to write out a new statement. The new statement did not contain any information not contained in earlier statements.

74. At 2:15 P.M. the officers took defendant to court where he met with his lawyer.

75. Defendant was formally charged with the murder of Frank Evans after his interrogation on March 18, 1986.

Conclusions of Law

Defendant supports his motion to suppress all statements on the following grounds: 1) that his arrest was made in violation of Florida law and without probable cause in violation of both the Vermont and United States Constitutions; 2) that all statements made after the arrest were tainted; 3) that police failed to advise defendant of his Miranda rights at the outset of their interview and all subsequent statements were received in violation of Vermont statutory and Vermont and federal constitutional law; 4) that defendant did not knowingly and intelligently waive his constitutional rights; 5) that police induced the March 15th confession through promises; 6) that defendant was denied his state constitutional right to counsel; and 7) that an intentional delay of defendant's arraignment violated the Vermont Rules of Criminal Procedure.

The court assumes, without deciding, that defendant's arrest was lawful. /2 Although he signed several waiver

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/2 The issue of pretextual arrests is before the United States Supreme Court this term. State v. Blair, 691 S.W.2d, 259 (Mo. 1985) cert. granted. 40 S.Ct. 4008 (1986). Resolution of the issue is unnecessary for the present motion.

forms, defendant contends, among other things, that his waiver of Miranda rights and subsequent confessions were not voluntary, knowing or intelligent. This court agrees and does not reach the other issues raised.

Both the Fifth Amendment to the United States Constitution and Chapter I, Article 10 of the Vermont Constitution protect individuals against compelled self-incrimination. An individual may waive those rights and any statement given voluntarily, knowingly, and intelligently is admissible in evidence. Miranda v. Arizona, 384 U.S. 436, 444 (1966). To be voluntary, "a confession must be the product of a rational intellect and the unfettered exercise of free will." State v. Zehner, 142 Vt. 251 (1982). The State has the burden to prove by a preponderance of the evidence that the confessions were voluntary and the waiver knowing and intelligent. Lego v. Twomey, 404 U.S. 477 (1972); Tague v. Louisiana, 444 U.S. 469 (1980); State v. Badger, 141 Vt. 430 (1982); State v. Harvey, 145 Vt. 654 (1985).

This court "must consider the totality of the factual circumstances in evaluating this issue of waiver." Badger, 141 Vt. 430, quoting North Carolina v. Butler, 441 U.S. 369, 374-75 (1979). In Badger, the defendant moved to suppress two confessions. The prosecution did not challenge the suppression of the first, which was obtained without Miranda warnings. The defendant in Badger was

sent home after his first confession, consulted with a psychologist, and arrived at the police station the next day, accompanied by his parents. He later made a second confession. The Vermont Supreme Court determined that the "coercive atmosphere, the youth of the defendant [16 years old], the absence of counsel and the threat of a lie detector test ... combined to render the second waiver suspect." Id. at 441-42.

The facts in this case are even more compelling. From the outset of the investigation, the team intended to question defendant in a "non-custodial" uncounseled, setting. When other efforts failed, a warrant was requested which ultimately led to the defendant's arrest in Florida. A Florida police officer told defendant that he was under arrest as a fugitive from justice for an underlying simple assault charge in Vermont. When the Vermont officers met with defendant he had been in custody for more than two days. During that time, he had no contact with family, friends, or counsel. The officers knew that defendant had requested and was assigned counsel on the fugitive charge. Despite that request, defendant never met with an attorney until March 18, immediately before his arraignment in Vermont.

On March 15, the officers engaged in a forty-minute, casual and friendly conversation before they warned him of his Miranda rights. The reading and purported waiver of

rights were made before the officers told defendant the subject matter of the questioning. After Sheriff West read each right from a standard "Miranda Warnings" form, defendant stated that he understood that right. When Sheriff West initially confronted defendant with the fact of Frank Evans death, defendant denied any involvement. Ninety minutes after the Miranda warnings were given, defendant admitted killing Frank Evans.

Custodial situations are inherently coercive. Miranda, 384 U.S. 436. On the facts of this case, the State has failed to convince the court otherwise. Defendant's lengthy, uninterrupted incarceration and isolation from family, friends and counsel strongly indicate that he did not voluntarily waive his rights. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to techniques of persuasion ... cannot be otherwise than under compulsion to speak." Id. at 461.

The absence of counsel provides further evidence of involuntariness. Badger, 141 Vt. at 441. Neither the Florida nor Vermont authorities honored defendant's request to speak with an attorney. "The simple fact that the defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." Michigan v. Jackson, 39 Cr.L. 3001, 3003, n.7 (1981), citing 365

N.W.2d at 67. The State urges this court to find that the prior request for counsel was limited to the fugitive charge. However, that charge was used to hold and question defendant about a murder. The State's fine distinction between the fugitive charge and the murder investigation is one without a difference when this court considers the validity of the waiver. Defendant requested counsel to deal with his situation, one created by the officers who interrogated him.

In Badger the absence of counsel was one factor the Vermont Supreme Court considered in evaluating the voluntariness of the defendant's waiver. Yet nothing in Badger indicates that the defendant had requested counsel. In this case, defendant's prior request for counsel before Florida authorities was ignored. Defendant testified that he believed a similar request of out-of-state (Vermont) authorities would have been to no avail. This court cannot dismiss that belief as without basis.

Another factor in the totality of the circumstances analysis is whether the defendant was informed of the subject matter of questioning prior to the administration of Miranda rights. In this case he was not. The issue is before the United States Supreme Court in People v. Spring, 713 P.2d 865 (Colo. 1985) cert granted, 106 S.Ct. 1961 (May 5, 1986). In Spring the Colorado Supreme Court considered the police failure to inform a suspect of the

subject matter of interrogation as one factor among the totality of the circumstances. It upheld a reversal of the defendant's first degree murder conviction.

The Vermont Supreme Court applied the same standard when it determined that a defendant revoked an earlier waiver of Miranda rights. State v. Mosher, 143 Vt. 197 (1983). The court stated:

> The fact that defendant clearly was under the misimpression that he had been asked to come to the police station regarding his complaint of a stolen car, and that he signed the Miranda waiver form while under that misimpression, casts considerable doubt on the effectiveness of the initial waiver.

Id. at 203. The court concluded "in light of the totality of the circumstances, the conduct of the eighteen-year-old defendant amounted to a revocation of his earlier waiver of Miranda rights." Id. at 204.

When the defendant in the present case signed a waiver form, he knew only that he was under arrest for a simple assault charge in Vermont. That limited knowledge led to a misimpression that the officers intended to question him about the assault. Failure to inform the defendant of the subject matter of questioning, although not dispositive, is an additional factor supporting defendant's argument that his waiver was unknowing and involuntary.

Defendant's personal characteristics further support a finding of involuntariness. A nineteen year old suspect with an eighth grade education and no prior incarceration was confronted by two police officers in a small, closed room located in a prison far from home. The State has not proven that the confrontation was anything but coercive.

Given the totality of the factual circumstances, the State has not carried its burden to prove that defendant's waiver of rights on March 15 was voluntary, knowing, and intelligent. Prolonged incarceration, defendant's youth and limited education, isolation from family and friends, relative unfamiliarity with the criminal justice system, absence of counsel, and failure to warn of the subject matter of questioning combine to suggest that the defendant's free will may have been overpowered. The State has not proven that his confession was "the product of a rational intellect and exercise of free will." Zehner, 142 Vt. 251. The court must therefore conclude that the March 15 confession was obtained in violation of both the Fifth Amendment and Chapter I, Article 10 and must be suppressed.

The inquiry whether subsequent confessions should also be suppressed involves two elements. The first is causation. The second is whether "granting the establishment of the primary illegality, the evidence to which the instant objection is made has been come to by

exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 372 U.S. 471, 488 (1963); State v. Jewett, No. 83-478, slip op. at 4, 5 (Vt. filed August 14, 1986); see also Badger, 141 Vt. at 439.

The causal nexus between the first and subsequent confessions is clear. The police elicited a statement on March 16 to supplement the previous day's oral confession and to obtain a written confession. On March 17, defendant volunteered a statement that directly referred to the March 15 confession. The purpose of the March 18 statement was to obtain a "Vermont confession" based on statements previously made.

No events intervened to break that causal link. Defendant's custody was continuous. He had no contact with family, friends, or counsel. The circumstances that led this court to find that the initial statement was involuntary did not change. Miranda warnings, without more, do not establish voluntariness. Nor are they sufficient to purge the taint of the primary illegality. See Badger, 141 Vt. at 440.

The State relies on subsequent administration of Miranda warnings as evidence that the March 16 and 18 statements was voluntary. In Oregon v. Elstad, 105 S.Ct. 1285, 1298 (1985) the United States Supreme Court held that "a suspect who has once responded to unwarned

yet uncoerced questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." The Court found that the defendant's initial statement was voluntary and dealt only with a technical violation of Miranda. It determined that "the relevant inquiry is whether ... the second statement was also voluntarily made." Id. In this case defendant's initial statement was not voluntary and the Elstad holding is inapplicable. The State has not convinced this court that the circumstances surrounding either the March 16 or March 18 confession changed sufficiently to purge the taint of the first, involuntary, confession.

The State has failed to prove by a preponderance of the evidence that defendant voluntarily confessed, and knowingly, and intelligently waived his rights.

Order

Accordingly, defendant's motion to suppress statements he made from March 15, 1986 through March 18, 1986 is GRANTED.

Dated this 16th day of December, 1986.

Alan W. Cook
District Judge